(12) B638

No. 08-368

Supreme Court, U.S.
FILED
JAN 20 2009
OFFICE OF THE CLERK

118

IN THE

# Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

*Petitioner,*

—v.—

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF OF THE COMMONWEALTH LAWYERS ASSOCIATION AND JUSTICE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER


BEN EMMERSON QC
ALEX BAILIN
HELEN LAW
Matrix Chambers
Griffin Building
Gray's Inn
London WC1R 5LN
+44 207 404 3447

TIMOTHY OTTY QC
20 Essex Street
London WC2R 3AL
+44 207 842 1200

JUAN MORILLO*
CLIFFORD CHANCE US LLP
2001 K Street NW
Washington DC 20006-1001
(202) 912-5000

MICHAEL SMYTH
CLAIRE FREEMAN
CLIFFORD CHANCE LLP
10 Upper Bank Street
London E14 5JJ
+44 207 006 1000

* *Counsel of Record*

*Attorneys for* Amici Curiae


BDT: 4AW163

## TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... ii

STATEMENT OF INTEREST..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 9

I. EXECUTIVE DETENTION WITHOUT TRIAL IS GENERALLY CONTRARY TO THE RULE OF LAW..... 9

II. EXECUTIVE DETENTION IS CONTRARY TO THE RIGHT TO LIBERTY. ..... 15

III. A STATE OF WAR OR THE EXISTENCE OF A PUBLIC EMERGENCY DOES NOT PREVENT THE COURTS FROM DETERMINING THE LEGALITY OF EXECUTIVE DETENTION..... 19

IV. ANY ATTEMPT TO ENACT EXECUTIVE DETENTION REQUIRES CLEAR AND EXPRESS WORDS..... 24

CONCLUSION..... 26

## TABLE OF AUTHORITIES

**CASES** **PAGE**

*A and others v Secretary of State for the Home Department* [2005] 2 AC 68 .....*passim*

*A and others v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221 ..... 10

*Aksoy v Turkey* (1996) 23 EHRR 553 ..... 17

*Beit Sourik Village v Govt. of Israel* (HCJ 2056/04, 30 June 2004) ..... 19

*Brannigan and McBride v United Kingdom* (1994) 17 EHRR 539 ..... 17

*Brogan v United Kingdom* (1998) 11 EHRR 117 ..... 17

*International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728..... 20

*Secretary of State for the Home Department v JJ and others* [2008] 1 AC 385 ..... 4

*Korematsu v US* 584 F. Supp (1984) 1406 (ND Cal 1984) ..... 19

*Kurt v Turkey* (1998) 27 EHRR 373 ..... 23

*Liversidge v Anderson* [1942] AC 206 ..... 19

*Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203 ..... 25

**CASES** **PAGE**

*Naidike v A-G of Trinidad and Tobago* [2005] 1 AC 538 ..... 24

*Public Committee Against Torture v State of Israel* (1999) 7 BHRC 31 (HCJ 5100/94, 6 September 1999) ..... 19

*R (Morgan Grenfell) v Special Commissioner of Income Tax* [2003] 1 AC 563 ..... 24

*R v Home Secretary ex p Simms* [2000] 2 AC 115 ..... 24

*R v Kyham & others* [2008] EWCA Crim 1612 ..... 4

*R(I) v City of Westminster Magistrates' Court* [2008] EWHC 2146 (Admin) ..... 7

*Tam Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 ..... 24

**UK STATUTES and STATUTORY INSTRUMENTS**

Anti-terrorism Crime and Security Act 2001 *passim*

Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644) ..... 14

Prevention of Terrorism Act 2005..... ..... 4

Terrorism Act 2000..... ..... 7

Terrorism Act 2006..... ..... 7

**EUROPEAN LAW** **PAGE**

Council of Europe Resolution 1271 (2002)..... 22

European Convention on Human Rights .....*passim*

**OTHER**

Council of Europe: *Guidelines on human rights and the fight against terrorism* (2002)..... 22

The Government Reply to the Nineteenth Report from the Joint Committee on Human Rights, "*Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*", Session 2006-07, HL Paper 157, HC 394 (Cm 7215)..... 6, 8

International Covenant on Civil and Political Rights 1966.....14, 18

Minutes of Evidence Taken Before Joint Committee on Human Rights, HC 1142i ..... 6

*Personal Freedom and the Dilemma of Democracies* (2003) 52 ICLQ 841 ..... 12

## STATEMENT OF INTEREST[1]

The Commonwealth Lawyers Association (the "CLA") is a body dedicated to the rule of law throughout the Commonwealth. All Law Societies and Bar Associations of the 53 countries comprising the Commonwealth are institutional members of the CLA. Four signatories to this brief (Ben Emmerson QC, Alex Bailin, Helen Law and Timothy Otty QC) are practising members of the Bar of England and Wales, and one is a member of the CLA (Timothy Otty QC). The CLA has submitted *amicus* briefs in a number of recent cases before this Court.

JUSTICE was founded in 1957 as an independent human rights and law reform organisation. It is the British section of the International Commission of Jurists. JUSTICE has a long history of intervening in cases involving important matters of public interest, especially involving the protection of fundamental rights; not only in the English Courts but also before the Privy Council, the European Court of Human Rights and the European Court of Justice.

---

[1] The parties have consented to the filing of this brief. The Petitioner and Respondent have each filed a letter of consent to all *amicus* briefs with the Clerk of the Court. No counsel for any party authored this brief either in whole or in part, and no persons other than the *amici curiae* and their legal counsel made any monetary contribution to its preparation or submission.

This brief is submitted in support of the Petitioner, but the CLA and JUSTICE wish to make it clear that they do not presume to examine or comment directly on the judgment of the Court of Appeals (Fourth Circuit) in this case. The main purpose of this brief is to explain the basis on which the courts of England and Wales have approached the issue of executive detention without trial.

We hope this may assist this Court for the following reasons:

1. Because the most recent attempt to enact a system of executive detention without trial in England and Wales was made in direct response to the terrorist attacks committed in the United States on 11 September 2001;

2. Because, when determining the legality of executive detention without trial, the English courts have had regard to fundamental rights and other principles of universal application, such as the rule of law, which concepts are common to both the English and American jurisdictions;

3. Because this Court has recently taken into account relevant English laws and jurisprudence governing, for example, the origins of habeas corpus in determining the legality and constitutionality of those detained by the military at Guantanamo Bay Naval Base.

All of the parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

In English law, executive detention without trial is not generally permissible and is contrary to the rule of law and the right to liberty. This is clear from an analysis of the most recent attempts to introduce detention without trial.

The United Kingdom Government sought in 2001 [2] to introduce a system of preventative detention without trial for foreign nationals (but not British citizens) suspected of having links with terrorism. That attempt was abandoned following a decision by the House of Lords [3] that such detention did not comply with the right to liberty contained in Article 5 of the European Convention on Human Rights ("the European Convention") and was discriminatory and disproportionate. Following that ruling of the House of Lords, the United Kingdom Government did not attempt to extend the ambit of the 2001 Act to British citizens so as to alleviate any discrimination, even though the threat to which that Act was directed emanated partly from British citizens. The legislation which was enacted in its place (a system of "control

---

[2] See Part IV of the Anti-terrorism, Crime and Security Act 2001 ("the 2001 Act").

[3] *A and others v Secretary of State for the Home Department* [2005] 2 AC 68.

orders"[4]) has not been successfully used to deprive anyone of his liberty[5] but does apply to British citizens and foreign nationals alike. There have, however, been a number of successful prosecutions of high profile international terrorist suspects, usually with links to Al-Qaida and foreign training camps, which have resulted in substantial sentences of imprisonment.[6]

The scheme in the 2001 Act was held to be unlawful by the House of Lords, notwithstanding the intended safeguards it contained. For example, it required an express "derogation" from the right

---

[4] See the Prevention of Terrorism Act 2005.

[5] To date only "non-derogating" control orders have been made by the executive – such orders may not deprive a person of his liberty. The House of Lords in *Secretary of State for the Home Department v JJ and others* [2008] 1 AC 385 recently ruled on the permissible limits of non-derogating control orders (e.g. an 18-hour house curfew did amount to deprivation of liberty).

[6] For example, *R v Kyham & others* [2008] EWCA Crim 1612 concerned an advanced terrorism conspiracy described by the Court of Appeal (at paragraph 7) as extending "over three continents. Its objective was to further the conspirators' perverted view of the cause of Islam by using violence wherever possible, but in particular in the UK, with proposed terrorist attacks on the London Underground, nightclubs, public houses and synagogues. ... some of the conspirators, including [the lead conspirator] Khyam, had attended a training camp in Pakistan where they were given training in the use of explosives." In 2007, five men were convicted of conspiracy to cause explosions likely to endanger life or cause serious injury to property and all received life sentences (with minimum tariffs of between 17 and 20 years). Their appeals against conviction were unsuccessful.

to liberty in the European Convention because preventative detention was not within one of the permissible types of detention prescribed by Article 5. The United Kingdom Parliament was therefore required to determine, when enacting the 2001 Act, whether there was a "public emergency threatening the life of the nation" such that a derogation from the right to liberty was "strictly necessary" [7]

Moreover, although under the 2001 Act the Secretary of State had the power to designate a person as a suspected terrorist and therefore detain him indefinitely, that classification was reviewed by an independent and impartial civilian court (the

---

[7] Article 15 of the European Convention provides:

> (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
>
> (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

"Special Immigration Appeals Commission (SIAC)"). Although the detainee was not necessarily entitled to see all the material relied upon in support of his detention, any "closed" material which was withheld from him could be seen in entirety by a "special advocate" instructed to represent his interests before SIAC. The legality of the entire system of detention without trial and the legality of any individual's detention could be appealed up through the English courts in the ordinary way.

The only form of detention without trial which currently exists in England and Wales is therefore "pre-charge detention". This is so even though the United Kingdom Government still contends that there is (since 11 September 2001) an ongoing public emergency threatening the life of the nation, [8] and notwithstanding the terrorist

---

[8] See, for example, The Government Reply to the Nineteenth Report from the Joint Committee on Human Rights, "*Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*", Session 2006-07, HL Paper 157, HC 394 (Cm 7215), September 2007, p.16, stating "...the Government's position on whether or not we face a public emergency has never changed in the intervening period [since the 2001 Act]. Our decision not to derogate from Article 5 for the purposes of control orders does not reflect an assessment that we no longer face a public emergency threatening the life of the nation. Indeed, it is clear that the threat from international terrorism to the UK has increased since 2001." See also, the evidence of the Home Secretary, Jacqui Smith, to the Joint Committee on Human Rights on 28 October 2008, confirming the Government's view that there remains an ongoing public emergency in the United Kingdom: *Minutes of Evidence Taken Before Joint Committee on Human Rights*, HC 1142i, question 25.

attacks on London in July 2005 which killed 52 civilians. Pre-charge detention enables the police[9] to detain a person who is the subject of a criminal terrorist investigation for a period of up to 28 days.[10] At the end of the 28-day period the detainee must be charged with a criminal offence or released. This highly limited power of detention without trial must be sanctioned by a judge[11] (within 48 hours' of the initial detention and typically for periods of no more than 7 days at a time) who must be satisfied that the ongoing criminal investigation is being diligently pursued and that it is necessary to detain the suspect during the investigation. If there is no ongoing investigation, or if the aim of the investigation is not to bring criminal charges, there can be no lawful detention.

The legality of the 28-day period of pre-charge detention has not yet been ruled upon by the English courts[12] or by the European Court of Human Rights. The United Kingdom Government's two attempts to introduce longer

---

[9] For detention up to 14 days, applications are made by the police. Between 14 and 28 days, all applications to extend pre-charge detention are made by the Crown Prosecution Service.

[10] Schedule 8 of the Terrorism Act 2000 as amended by sections 23-25 of the Terrorism Act 2006.

[11] Up to 14 days the application is to a designated magistrate; between 14 and 28 days it is to a High Court judge.

[12] A preliminary challenge (inability of the judge to grant bail to such a pre-charge detainee) was made in *R(I) v City of Westminster Magistrates' Court* [2008] EWHC 2146 (Admin).

periods of pre-charge detention (90 days and 42 days) both failed because of insufficient Parliamentary support. Pre-charge detention was the subject of unprecedented levels of Parliamentary scrutiny and debate. The debates focused in detail on the reasons why the Government said an extension to the current power was necessary; how the particular proposed length of extension could be justified; how the power could be reconciled with the right to liberty in the English common law; all possible alternatives to an extension; the precise wording of the provisions and the safeguards they contained, or could include. In 2007 the Government accepted that: "How far the limit should be extended should be a matter for consultation and debate, but we agree that a maximum limit should be set by Parliament."[13]

Any attempt to introduce detention without trial in the United Kingdom has been made with clear and specific express words in proposed legislative provisions. There is no recent example of any attempt to detain a person executively that has not sought to comply with this elementary requirement of the English common law and the fundamental principle of legality.

We emphasise that we do not herein make any direct submissions on the President's power

---

[13] The Government Reply to the Nineteenth Report from the Joint Committee on Human Rights, *"Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning"*, op cit., question 10.

and authority under the Constitution and Authorization for Use of Military Force to order the military to detain the Petitioner. But by considering the way in which the English courts have analyzed detention without trial, it is hoped that this Court will be assisted by the fundamental principles governing the issue in deciding how to approach and dispose of this appeal, which clearly raises matters of considerable public importance.

## ARGUMENT

### I. EXECUTIVE DETENTION WITHOUT TRIAL IS GENERALLY CONTRARY TO THE RULE OF LAW.

The (9-judge) House of Lords in *A and others v Secretary of State for the Home Department* [2005] 2 AC 68 (commonly known as "the *Belmarsh*[14] case") ruled (by a majority of 8-1) that the scheme of executive detention without trial contained in Part IV of the Anti-terrorism Crime and Security Act 2001 violated the right to liberty contained in Article 5 of the European Convention. Although the House of Lords ultimately allowed the appeal on the basis that the 2001 Act was discriminatory and disproportionate and therefore that the measures contained in it were not "strictly required" by the exigencies of the situation[15], their

---

[14] Since many of the detainees in question were held at Belmarsh prison in London.

[15] Other grounds of appeal which were before their Lordships during the *Belmarsh* appeal (e.g. the admissibility in SIAC of

Lordships emphasized the fact that detention without trial was generally contrary to the rule of law. Lord Nicholls, for example, at paragraph 74 said:

> "Executive detention is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford."

Lord Hoffmann said at paragraph 86:

> "This is one of the most important cases which the House has had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom."

Lord Hope at paragraph 100 explained that:

> "It is impossible ever to overstate the importance of the right to liberty in a democracy. In the words of Baron Hume,

---

evidence obtained by torture) formed the basis of a subsequent successful appeal: *A and others v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221.

*Commentaries on the Law of Scotland respecting Crimes*, 4th ed. (1844), vol. 2, p 98:

> "As indeed it is obvious, that, by its very constitution, every court of criminal justice must have the power of correcting the greatest and most dangerous of all abuses of the forms of law,—that of the protracted imprisonment of the accused, untried, perhaps not intended ever to be tried, nay, it may be, not informed of the nature of the charge against him, or the name of the accuser." "

Lord Hope went on to say that Baron Hume:

> "knew the dangers that might lie in store for democracy itself if the courts were to allow individuals to be deprived of their right to liberty indefinitely and without charge on grounds of public interest by the executive. The risks are as great now in our time of heightened tension as they were then."

Lord Bingham had (at the time he was the senior law lord) also said (extra-judicially):

> "Freedom from executive detention is arguably the most fundamental and probably the oldest, the most hardly won and the most universally recognised of human rights. Yet in times of emergency, crisis and serious disorder it is almost the first right to be

> curtailed. It is in that sense vulnerable... The exercise of exceptional executive powers calls for exceptional vigilance on the part of all whose duty it is to hold the executive to account."[16]

The context of the decision in the *Belmarsh* case is important to understanding the strength of the sentiment expressed by their Lordships. The United Kingdom Government introduced the 2001 Act to Parliament two months after the devastating terrorist attacks perpetrated on the United States of America on 11 September 2001.

Part IV of the 2001 Act granted the executive the power to certify that it reasonably believed a person's presence in the United Kingdom to be a risk to national security and reasonably suspected him to be a terrorist. A terrorist for this purpose included a person who: (a) was or had been concerned in the commission, preparation or instigation of acts of international terrorism; (b) was a member of or belonged to an international terrorist group; or (c) had links with an international terrorist group. A certified person was then liable to indefinite executive detention. Those persons in fact certified and detained had never been the subject of criminal prosecution for the activities said to justify their detention, save one who was acquitted at trial.

---

[16] Lord Bingham, *Personal Freedom and the Dilemma of Democracies* (2003) 52 ICLQ 841 at 842, 857.

Part IV of the 2001 Act was characterized as an immigration power, and therefore only applied to foreign nationals. Prior to the 2001 Act, it was only possible to detain a foreign national pending deportation, so that if deportation was found to be unlawful, the person would have to be released. The 2001 Act obviated that consequence by providing that a foreign national who could not be deported could nonetheless be detained indefinitely.

At the same time as introducing the 2001 Act, the Government derogated from the right to liberty in Article 5(1) of the European Convention, on the basis that:

> "The terrorist attacks in New York, Washington, D.C. and Pennsylvania on 11th September 2001 resulted in several thousand deaths, including many British victims and others from 70 different countries. In its resolutions 1368 (2001) and 1373 (2001), the United Nations Security Council recognised the attacks as a threat to international peace and security.
>
> The threat from international terrorism is a continuing one. In its resolution 1373 (2001), the Security Council, acting under Chapter VII of the United Nations Charter, required all States to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks.

> There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom."[17]

Their Lordships' comments about the rule of law and executive detention must therefore be read in the context of the very serious terrorist threat posed to the United Kingdom which the United Kingdom Government contended existed at that time. The 11 September attacks were described variously by their Lordships as "atrocities on an unprecedented scale... intended to disable the governmental and commercial power of the United States" [18], "horrific" [19], and "unheralded" [20]

---

[17] Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644). Corresponding steps were taken to derogate from Article 9 of the International Covenant on Civil and Political Rights 1966, which is similar in effect to Article 5 of the European Convention, although (unlike Article 5) not incorporated into domestic law.

[18] Lord Bingham at paragraph 6.

[19] Lord Scott at paragraph 154.

[20] Lord Rodger at paragraph 166.

Notwithstanding this grave context, their Lordships could not reconcile the conflict between the rule of law and the scheme of executive detention which the 2001 Act authorized.

## II. EXECUTIVE DETENTION IS CONTRARY TO THE RIGHT TO LIBERTY.

Baroness Hale explained the position succinctly at paragraphs 222-223 of the *Belmarsh* case:

> "Executive detention is the antithesis of the right to liberty and security of person. Yet that is what the 2001 Act allows."

Indeed the Government must have accepted that executive detention without trial was contrary to the right to liberty since otherwise a derogation from Article 5 (right to liberty) of the European Convention would not have been necessary.[21]

Although the House of Lords ultimately decided the *Belmarsh* case on the basis of incompatibility of the 2001 Act with the right to liberty contained specifically in Article 5, it

---

[21] The United Kingdom Government reserved its right to argue (in the European Court of Human Rights) that a derogation from Article 5(1)(f) was not in fact required – it did not make that submission in the English courts. The judgment of the Grand Chamber of the European Court of Human Rights in the *Belmarsh* case is awaited.

recognised (as has this Court) that the right to liberty is an ancient right:

Lord Bingham noted, at paragraph 36, that in emphasizing:

> "... the fundamental importance of the right to personal freedom ... the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day."

Lord Hoffmann reiterated at paragraph 88:

> "... I would not like anyone to think that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law."

The fundamental importance of the right to liberty also re-enforces its role as part of the rule of the law. In *Aksoy v Turkey* (1996) 23 EHRR 553 at paragraph 76:

> "The court would stress the importance of article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the state with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in article 5(3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law."

Previously, a 7-day period of pre-charge detention (if sanctioned by a judge) used in Northern Ireland required an express derogation from the right to liberty under the European Convention, which was only possible because there was held to be a public emergency threatening the life of the nation which justified such a measure.[22] A 4-day period of pre-charge detention (without access to a judge during that time) was held to violate the right to liberty.[23] Accordingly, it is far from clear, particularly in the absence of any accompanying derogation from the right to liberty,

---

[22] *Brannigan and McBride v United Kingdom* (1994) 17 EHRR 539.

[23] *Brogan v United Kingdom* (1998) 11 EHRR 117.

that the current 28-day pre-charge detention power in the United Kingdom would be considered compatible with the right to liberty by the European Court, or indeed by the English courts.

Article 9 of the International Covenant on Civil and Political Rights 1966 ("ICCPR") [24] is expressed in terms very similar to those of Article 5 of the European Convention, and has led to the promulgation of "The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR" (1985) 7 HRQ 3. Lord Bingham quoted the Principles with approval at paragraph 36 of the *Belmarsh* case:

> "The authors of the "Siracusa Principles", although acknowledging that the protection against arbitrary detention (article 9 of the ICCPR) might be limited if strictly required by the exigencies of an emergency situation (article 4), were none the less of the opinion that some rights could never be denied in any conceivable emergency and, in particular (para. 70 (b)), "no person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge ..." "

---

[24] The ICCPR is not incorporated directly into English domestic law.

## III. A STATE OF WAR OR THE EXISTENCE OF A PUBLIC EMERGENCY DOES NOT PREVENT THE COURTS FROM DETERMINING THE LEGALITY OF EXECUTIVE DETENTION.

Even "amid the clash of arms"[25], a court must never surrender the constitutional duties placed upon it. The United States and other jurisdictions have recognised that even "in times of distress, the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." [26] It is submitted that the constitutional duty of a court includes its inherent and inalienable power to consider whether any legislative measure accords with the rule of law. That duty is sacrosanct when the legislative measure under consideration is executive detention without trial: a power which, on its face, would, if upheld without proper judicial scrutiny, undermine the very foundations of democracy.

---

[25] *per* Lord Atkin in *Liversidge v Anderson* [1942] AC 206 at 244.

[26] Patel J in *Korematsu v US* 584 F. Supp (1984) 1406 (ND Cal 1984) at 1420 (quoted by Lord Bingham at paragraph 41 of the *Belmarsh* case). See also the Israeli Supreme Court decisions in *Public Committee Against Torture v State of Israel* (1999) 7 BHRC 31 (HCJ 5100/94, 6 September 1999) at paragraph 39 (*per* President Barak); *Beit Sourik Village v Govt. of Israel* (HCJ 2056/04, 30 June 2004) at paragraphs 36ff.

Thus, even though the existence of a public emergency and the associated national security issues might traditionally have been regarded as examples of non-justiciability *par excellence,* the House of Lords in the *Belmarsh* case declined to so treat them, when fundamental rights were at stake. Indeed the House of Lords in the *Belmarsh* case ruled upon whether there was a public emergency threatening the life of the nation, and decided that there was (by a majority of 8-1) but that the measures contained in the 2001 Act were nevertheless not strictly required by that emergency.

The House of Lords expressly rejected the submission that it was undemocratic for them (not being accountable to the electorate) to adjudicate upon matters such as the existence of a public emergency. As Lord Bingham observed at paragraph 42:

> "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself."

Lord Bingham also quoted with approval Simon Brown LJ, who had observed in *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, paragraph 27, that "the court's role under the [Human Rights Act] 1998 ... is as the guardian of

human rights. It cannot abdicate this responsibility." He went on to say, in para 54:

> "Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts."

Adopting that approach, the House of Lords carefully scrutinized the legislative choice of immigration legislation as the appropriate response to a threat which was nationality-neutral. The House of Lords concluded that the 2001 Act, being exclusively directed to foreign nationals, was not strictly required by the exigencies of the situation which included a threat which emanated in part from British citizens.

Lord Hoffmann at paragraph 89 of the *Belmarsh* case considered the historical context of the "public emergency" justification which the Government relied upon post-9/11 in support of the 2001 Act:

> "There have been times of great national emergency in which habeas corpus has been suspended and powers to detain on suspicion conferred on the Government. It happened during the Napoleonic Wars and during both World Wars in the 20th century. These powers were conferred with great misgiving and, in the sober light of retrospect after the emergency had passed, were often found to

> have been cruelly and unnecessarily exercised."

Lord Hoffmann went on to observe at paragraph 97 in relation to the 2001 Act:

> "In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve."

The importance of the rule of law is not diluted in any way by the existence of a war or other public emergency. For example in Resolution 1271 adopted on 24 January 2002, the Parliamentary Assembly of the Council of Europe held that "The combat against terrorism must be carried out in compliance with national and international law and respecting human rights". The Committee of Ministers of the Council of Europe on 11 July 2002 adopted *"Guidelines on human rights and the fight against terrorism"*. These recognised the obligation to take effective measures against terrorism, but continued:

> "All measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment ..."

The European Convention itself is intended to provide for the protection of the rule of law in a democracy[27] and any interpretation of the rights and freedoms it guarantees has to be consistent with its general spirit as an instrument designed to maintain and promote the ideals and values of a democratic society. The right not to be arbitrarily deprived of personal liberty and to enjoy equality before the law and a fair trial are crucial aspects of the rule of law and democratic government. Thus in *Kurt v Turkey* (1998) 27 EHRR 373, paragraph 122, the European Court referred to "the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities".

---

[27] The fourth and fifth recitals in the Preamble to the European Convention provide:

"Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration"

## IV. ANY ATTEMPT TO ENACT EXECUTIVE DETENTION REQUIRES CLEAR AND EXPRESS WORDS.

In English law, Parliament should not be taken to have intended to legislate so as to override fundamental human rights (including the rights to liberty) except by clear and specific express words or by necessary implication.[28] The courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention.[29] Where there is any uncertainty in a legal provision, it must be resolved in favour of the liberty of the individual.[30]

As Lord Hoffmann explained in *R v Home Secretary ex p Simms* [2000] 2 AC 115 at paragraph 131, the need for clear and express words is to

---

[28] Lord Hoffmann in *R v Home Secretary ex p Simms* [2000] 2 AC 115, 131 and Lord Hobhouse in *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2003] 1 AC 563 at paragraph 45.

[29] See the decision of the Judicial Committee of the Privy Council, considering an appeal from the Court of Appeal of Hong Kong in *Tam Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, at 111E.

[30] See the Judicial Committee of the Privy Council, considering an appeal from the Court of Appeal of Trinidad and Tobago, in *Naidike v A-G of Trinidad and Tobago* [2005] 1 AC 538 at paragraph 48. The Committee went on to note: "*The governing principle is that a person's physical liberty should not be curtailed or interfered with except under clear authority of law.*"

ensure that Parliament fully understood and scrutinized what, precisely, it was consenting to:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."[31]

---

[31] Lord Hoffmann's comments have since been cited with approval by the Federal Court of Australia in *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203, and by the House of Lords in the second *Belmarsh* case, *A (No. 2)* (op cit.) at paragraph 51, by Lord Bingham.

In English and human rights law this concept is part of the "principle of legality": that any attempted interferences with fundamental rights must be prescribed by law, sufficiently accessible and ascertainable in advance and ought to comply with the requirements of legal certainty.

The legislative attempt to enact executive detention in the 2001 Act was in clear and express terms. The 2001 Act contained specific provisions authorising preventative detention on specified grounds and detailed the review mechanism for the legality of the detention.

Equally, the attempts between 2005 and 2008 to extend pre-charge detention beyond 28 days were proposed with express statutory words. Of course, those proposals were widely debated by the public and extensively scrutinised by Parliament, where they ultimately failed to achieve the necessary support. It is of note that the 90 day proposal was rejected by Parliament just four months after the July 2005 terrorist attacks in London, and constituted the only defeat in Parliament of the Government of the former Prime Minister, Tony Blair, during his ten years in office.

## CONCLUSION

Executive detention without trial has been used historically in the United Kingdom; in the Napoleonic Wars and both World Wars in the 20th century. But as Lord Hoffmann in the *Belmarsh* case noted, those powers were conferred with great

misgiving and, with sober retrospect, were often found to have been cruelly and unnecessarily exercised[32]. They are not, in the 21st century, precedents, but a cautionary note to the dangers inherent in executive detention.

The 2001 Act therefore remains the most recent relevant attempt to enact a regime of executive detention without trial in the United Kingdom. The decision and reasoning of the House of Lords in the *Belmarsh* case is the clearest, most contemporary exposition of the incompatibility of such detention with the rule of law and the right to liberty in the United Kingdom. The decision was made in the context of a public emergency threatening the life of the nation, directly resulting from the events of 11 September 2001, which (a majority of) the House of Lords held existed at the time.

If it were the United Kingdom, and not the United States of America, which had sought to detain a person without any prospect of facing criminal trial by reliance on a general military authorization to use necessary and appropriate force, such detention would, in accordance with English and human rights law as recently interpreted by the House of Lords, be contrary to the rule of law and the right to liberty, as well as in clear violation of the requirement that any infringement upon liberty be made only with clear and express words. The existence of a public

---

[32] Paragraph 89, excerpted above.

emergency threatening the life of the nation (even if arising out of the attacks of 11 September 2001 and 7 July 2005) would not affect that conclusion. We are, furthermore, unaware of any authority indicating that the position would be significantly different in any other Commonwealth State.

Dated: January 28, 2009

Respectfully submitted,

BEN EMMERSON QC
ALEX BAILIN
HELEN LAW
Matrix Chambers
Griffin Building
Gray's Inn
London WC1R 5LN
+44 207 404 3447

TIMOTHY OTTY QC
20 Essex Street
London WC2R 3AL
+44 207 842 1200

JUAN MORILLO
CLIFFORD CHANCE US LLP
2001 K Street NW
Washington DC 20006-1001
202.912-5000
*Counsel of Record*

MICHAEL SMYTH
CLAIRE FREEMAN
CLIFFORD CHANCE LLP
10 Upper Bank Street
London E14 5JJ
+44 207 006 1000

*Attorneys for Amici Curiae*